IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD DONLAN and BEN W. HENDERSON, co-partners, doing business under the firm name and style of DONLAN AND HENDERSON,

*Appellants,*

v. No. 3835

TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri,

*Appellee.*

## BRIEF OF APPELLEE.



CHARLES H. HALL,
WALTER L. POPE,
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## STATEMENT OF THE CASE.

Appellants' counsel in their statement of the case set out their own conclusions rather than the facts from which the conclusions are drawn. Every case cited by appellants so materially differs in its facts from the situation here to be passed upon that it is highly important that the court understand the essential elements of this transaction and the issues of law actually presented by the facts of this case before applying any of the cases.

This action was commenced by attachment by Donlan & Henderson as co-partners, citizens of Montana, against Turner, Dennis & Lowry Lumber Company, a corporation, a citizen of Missouri, in January, 1921, in the District Court of Missoula County, Montana, and was removed to the District Court for the District of Montana upon petition of defendant. After removal, defendant filed an answer setting up a counterclaim for a balance of notes made by defendant and demanding an accounting on transactions involving lumber destroyed by fire as hereinafter described and other lumber which was cut after the fire occurred. It developed at the trial that plaintiffs, the appellants here, were seeking to recover from defendant, appellee here, the difference between what appellee had advanced on the lumber destroyed by fire and what appellants alleged to be the reasonable market value of it at the time of the fire, which difference they claimed was $60,000.00 Since appellants had purchased two million feet of the lumber about April 15, 1920, from one Smead and insured it for $35.00 per thousand feet, the amount they say they paid for it (Tr. 142), and the remainder of the destroyed lumber was cut between that date and August 3, 1920, and was insured by appellants as it was cut for an additional $60,000.00, it is apparent that appellants are demanding that appellee pay them quite a substantial profit on operations covering a little over three months. Appellee denies all liability to appellants for the destroyed lumber, and, while it does not affect the issues presented by this appeal, denies that any such loss as appellants claimed either was proved or existed.

On August 3, 1920, a little over three million feet of lumber which was in piles in the yard of the appellants at Fletcher Spur, near Pablo, Montana, awaiting disposition under what the trial court terms "a somewhat novel

contract," was destroyed by fire. Appellants carried $130,000.00 insurance on the lumber which they say was intended to meet the requirements of the contract between the parties requiring appellants to carry insurance to the extent of $25.00 per thousand feet in favor of appellee and to cover appellants' own loss or risk. (Tr. 141-142). Appellants paid appellee $60,000.00 of the first $70,000.00 of insurance collected and promised to pay out of further collections of insurance the remainder of what was due from appellants to appellee. (Tr. 228, 231-232, 234). Never until they brought this suit did appellants claim to appellee that appellants did not owe appellee some amount of money, and until this suit was brought it was conceded by all parties that the insurance was to be applied first to discharging appellants' obligation to appellee under the contract, and next as far as it would go, to any loss suffered by appellants by reason of the fire. and that the remainder of the loss, if any, must be borne by appellants. Up to the time this suit was filed the only contention made by appellants was that, since appellee had advanced only $20.00 per thousand feet on the lumber destroyed, it should not have $25.00 per thousand feet insurance as provided in the contract. Donlan testified: "There was no disposition on my part to deny and I never denied that the defendant in this case was entitled to that pro rata insurance, to cover that portion of the lumber covered by their bill of sale." (Tr. 370).

In this suit plaintiffs, for the first time, advanced the theory that the transaction constituted a sale by them to defendant for resale by it and that plaintiffs should recover what they might have received if the lumber had not been burned but had been sold as contemplated by the contract.

The learned trial judge held that the facts of this case do not support the legal theory advanced by plaintiffs, rendered judgment in favor of defendant against plaintiffs in the sum of $18,084.51, and incidentally held that other lumber cut under the contract since August 3, 1920, the date of the fire above described, is the property of defendant subject to the contract. From this judgment plaintiffs appealed without giving supersedeas bond.

In aid of the court we will describe the situation the parties undertook to meet, set out their agreement and briefly describe what they did under it. We will here confine ourselves to the evidence abstracted and reserve comment for that part of our brief devoted to argument.

The defendant, appellee here, is in the wholesale lumber business. As a part of its business it acted as a sales agent, or sales organization, for those mills which didn't have selling organizations of their own or had insufficient selling organizations, and acted as backers to small millers who hadn't sufficient capital to finance their own operations and who required loans or advances in order to take care of their operations. (Tr. 199). The plaintiffs, the appellants here, had a sawmill at Fletcher Spur, near Pablo, Montana, and made an arrangement with appellee to advance them money for their operations and market their lumber. With these purposes in view they entered into a writing dated April 16, 1920, the general effect of which is as follows:

It was agreed that appellee should pay appellants as an advancement thereon $20.00 per thousand feet of lumber inventoried and piled in appellants' yard and should also loan appellants $20,000.00 to be evidenced by appellants' notes, and that appellee should also pay and advance to

appellants the sum of $20.00 per thousand feet on all lumber to be thereafter sawed by appellants under and during the terms of the contract. The first advancement on the lumber in pile at the time of the agreement was to be, and was, paid in cash, but the advancements of $20.00 per thousand feet to be made on lumber subsequently cut was to be made by paying $10.00 per thousand in cash and applying an amount equal to $10.00 per thousand feet on the $20,000.00 promissory notes of appellants above mentioned; the intention being to use half of these advancements to reduce the amount of the notes, payable by appellants on a day certain, and add it to the amount repayable by appellants as the lumber should be marketed as hereinafter described. Both the notes and the advancements were to bear interest at the rate of seven per cent per annum until paid. The interest on the advancements was to be computed and adjusted monthly, based upon the balance thereof remaining against appellants, after deducting such advancements from the sale of all shipments in accordance with the following arrangement agreed upon for marketing the lumber and disposing of the proceeds: The appellants were to deliver the lumber f. o. b. cars at Fletcher Spur, either dressed or rough, as directed by appellee; the appellee was to market and sell the lumber for the highest market price obtainable at the time of making a sale, deduct from the net proceeds a 2% trade discount, a commission of 15% for its services in selling and the $20.00 per thousand feet theretofore advanced by it and honor appellants draft for the balance. In the meantime appellants were to insure in favor of appellee to the amount of $25.00 per thousand feet.

The agreement, as it was written, is as follows (Tr. 15): 15):

EXHIBIT "A"

"CONTRACT OF SALE

"This agreement, made, in triplicate, this 16th day of April, 1920, by and between Donlan & Henderson, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and Turner, Dennis & Lowry Lumber Company, a corporation of Jackson County, Missouri, hereafter called the vendees.

WITNESSETH,

"That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, 'All of the lumber now owned by the vendors in pile at their saw mill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur saw mill hereafter until the 1st day of January, 1921.

"And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to-wit:

"1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of $20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of $20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of $20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory of finished piles in the mill yard taken on or before the 10 day of each month, providing, however,

that $10.00 per thousand feet of such advancement shall be applied and credited on the $20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

"2. That the vendors shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

"3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

"4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less $20.00 per thousand feet already paid and advanced on said lumber has hereinbefore provided, which draft the vendees agree to honor and pay when presented.

"5. That upon the payment of the advance of $20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the

balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

"6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

"7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purposes of this contract.

"8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for $25.00 per thousand feet, the loss thereon to be made payable to the vendees.

"9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

"In witness whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN & HENDERSON,
By BEN W. HENDERSON.
TURNER, DENNIS & LOWRY
LUMBER COMPANY,
By THOS. S. DENNIS,
*Secy. & Treas.*

Attest.....,
*Secretary.*

Thereupon appellee paid appellants in drafts the sum of $60,000.00 and appellants gave appellee their two promissory notes for $10,000.00 each, dated April 16, 1920, one due in three months and the other due in four months from date (Tr. 207-208), leaving $40,000.00 as an advancement to be repaid with interest at 7% from proceeds of sale after deducting appellee's selling commission of 15% and other marketing expenses.

Under date of April 16, 1920, appellants further executed to appellee Plaintiff's Exhibit 1 as follows (Tr. 135):

BILL OF SALE

"Know all men by these presents: That we, Donlan & Henderson a copartnership of Pablo, Montana, the parties of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States of America, to them in hand paid by Turner, Dennis & Lowry Company, a corporation, of Jackson County, Missouri, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns.

"All the lumber now owned by us (Donlan & Henderson) in pile at our saw mill lumber yard at Fletcher Spur, near Pablo, Flathead County, Montana, containing approximately Two Million (2,000,000) board feet.

"This bill of sale is given, however, subject to our vendors' lien upon all of said lumber, for balance due thereon from said parties of the second part to the parties of the first part, according to a certain contract of sale, entered into between said parties on this 16th day of April, 1920.

"To have and to hold the same, to the said parties of the second part, its successors and assigns forever; subject, however of the vendors' lien before mentioned, and we do for our heirs, executors and administrators, covenant and agree to and with the said parties of the

second part its successors and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made, unto the said parties of the second part, its successors and assigns, against all and every person whomsoever, lawfully claiming or to claim the same.

"In witness whereof, we have hereunto set our hand and seal the 16th day of April in the year of our Lord one thousand nine hundred and twenty.

DONLAN & HENDERSON (Seal)
By E. DONLAN (Seal)
E.DONLAN (Seal)
BEN W. HENDERSON (Seal)

"Signed, sealed and delivered in the presence of:
A. J. VIOLETTE."

On June 28, 1920, appellee paid appellants $20,000.00 in two drafts, one for $15,000.00 and one for $5,000.00, of which $8,917.76 was advanced on 891,776 feet of lumber, to be repaid to appellee with interest at 7% from proceeds of sale after deducting appellee's selling commission of 15% and other marketing expenses. The balance of $11,082.24 was loaned to appellants with interest at 8% according to the supplemental agreement of June 28, 1920, set out on page 213 of the transcript, and appellants gave appellee a note for $6,082.24 due September 1 and a note for $5,000.00 due October 1. (Tr. 212). On June 28, 1920, appellants also executed and delivered Plaintiff's Exhibit 2, which "conveys from Donlan & Henderson, for a consideration of $8,917.76, to Turner, Dennis & Lowry Lumber Company. 891,776 feet of lumber in yard at Fletcher Spur, Flathead County, Montana." (Tr. 137).

On August 3 appellee further advanced to appellants, to be repaid by them with interest at 7% in the manner above described $20.00 per thousand feet on 446,636 feet of lumber by paying appellants a draft for $4,466.36 and apply-

ing a like amount on appellants' unpaid notes (Tr. 216). And on that date appellants also executed and delivered Plaintiffs' Exhibit 3, which "conveys from Donlan & Henderson, for a consideration of $4,466.36, to Turner, Dennis & Lowry Lbr. Co.

| | |
|---|---|
| "446,636 ft. a $20.00 /M | $8,932.72 |
| Less $10.00 /M | 4,466.36 |
| | $4,466.36 |

now being in the County of Flathead, State of Montana, the date of the bill of sale being left blank."

So far as appears from Exhibits 2 and 3 they evidence an absolute sale at the prices named and fully paid and show on their faces that nothing more was to be paid by appellee to appellants for the lumber described in them, but Ben W. Henderson testified orally that the lumber was delivered and sold under the contract of April 16, 1920. (Tr. 138). The total quantity described in Exhibits 1, 2 and 3 is 3,338,412 feet, it was stenciled with appellee's name, and all of it except ten cars theretofore shipped and one car then on the track was destroyed by fire on August 3, 1920 (Tr. 138-139, 224).

It was understood by the parties to this suit that appellee's interest was to be insured for $25.00 per thousand feet of lumber on which advancements were made and that all other risk of loss was assumed by appellants.

Thomas S. Dennis testified as follows:

> "I am not certain whether the discussion for the insurance came up before I went to Pablo or after my return, but prior to the general conference in Mr. Violette's office in which the contract was drawn up I

told the Senator we would have to be protected for our advancements by the insurance, and he said that was all right, and I said we would expect $25 a thousand protection, and he said, 'What is the $25 a thousand for; you are only advancing $20 a thousand?' I explained to him that in an operation of this kind anticipating a run of several months or indefinitely, we could not afford to tie up the heavy proportion of our capital in such an operation and devote my time and our western representative's time to the operation and put other items of expense into the handling of their operations before the lumber was in shipping shape and then have it all burn up and not have any manner in which we could recover the expenses we had invested." (Tr. 202).

The contract referred to is above set out and contains this clause:

"8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for $25.00 per thousand feet, the loss thereon to be made payable to the vendees."

Ben W. Henderson testified:

"This lumber was insured under our contract. We had $70,000 insurance which we placed with the old line companies the time we purchased the lumber; and we had the $6,000 placed with the Inter-Insurance Exchange, of Seattle, Washington; that we placed later and put it on as our yard filled up. In the first place we bought 2,000,000 feet of lumber from W. H. Smead, and when we made the purchase we insured it for $70,000, the price we paid for the lumber. That was on the 15th day of April, 1920. That insurance policy is in the bank; I surrendered it when I made our proof of loss. There was $20 per thousand feet made

payable to Turner, Dennis and Lowry, as their interest might appear, and as our interest might appear. The rest was made payable to us as our interest might appear. This second policy for $60,000 was taken out at intervals as the lumber increased in the yard when it was sawed. Our bookkeeper always ordered this insurance by telephone. The order was given to Mr. De Veuve, at Seattle, Washington, telephoned or wired by our bookkeeper. There was no provision made in that policy as to payment of insurance; it was payable to Donlan and Henderson. That was absolutely unintentionally inserted in there; it never occurred to me that they were not named in it until we went to make the proof; that was an oversight." (Tr. 141-142).

Ed Donlan testified as follows:

"When I talked with Mr. Dennis about what our agreement was to be, I didn't object to this $25 a thousand insurance. I knew Mr. Violette had put that in the contract. I first objected to that when they came in and demanded $5 a thousand profit after we losing the lumber, after sustaining our loss, they demanding their profit before we were getting anything. It would be all right if they paid us for the lumber in the first place and then took their profit; I wouldn't have objected to it. I understood every part of that contract fully." (Tr. 376).

In other parts of the testimony Donlan and Henderson speak of the $5.00 difference between the $25.00 a thousand mentioned in clause 8 of the contract and the $20.00 a thousand advanced by appellee on the lumber destroyed as a profit or bonus, and they objected to it for the reason that appellee had only an interest of $20.00 per thousand in the lumber.

Henderson admits that he collected $70,000.00 of insurance on September 29 and $60,000.00 more in October, that they made proofs of loss and signed articles of subrogation. (Tr. 154). In a letter to appellee dated August 30 he said:

> "We had no insurance on logs, had $130,000 on lumber. Our figures show that we were $35,000 underinsured on lumber. The adjusters made no protests. We have filed our proofs of loss and should be getting some money soon." (Tr. 156).

Upon being questioned he said that when he said, "we were underinsured" he referred to Donlan and Henderson. (Tr. 157). On page 362 he said further:

> "As to the reason why I was $35,000 underinsured, I recall that Mr. Daly, the representative of the Inter-Insurance Exchange, was there, a few days, I think, before the fire—not over a week before; he came around regularly to inspect the yard, and he asked me to take out more insurance at that time, and told me I was underinsured, and I told him that I didn't think I would at that time, that we expected to take a little chance along with the rest of them, and couldn't give it all to them fellows, or something to that effect. I intended to take out some, but I was a little too late; I intended to take out more." (Tr. 362).

The insurance coming to appellee at $25.00 per thousand feet of the lumber destroyed amounted to a little over $75,000.00. Donlan received $10.000.00 from the Inter-Insurance Exchange and later when Dennis was in Missoula he received $70,000.00 of insurance from the old line companies and paid Dennis $60,000.00 of this and promised to pay the balance when the rest of the money should come (Tr. 228). Dennis testified:

> "When I was in Missoula Senator Donlan told me

the balance would be paid with the remaining insurance money as soon as it was received, and Mr. Henderson made the same statement when I was at Pablo. I know only in a general way when these subsequent insurance monies were received by them." (Tr. 231-232).

Under date of October 28, 1920, appellee sent Donlan & Henderson the following telegram:

> "Inter-Insurance Exchange advise forwarded you twenty thousand Tuesday our financial requirements are very urgent and pressing and we trust you will forward this amouunt to us quickly will greatly appreciate your co-operation kindly wire us definite advice." (Tr. 234). .

In reply to which Donlan wired appellee under date of October 30, 1920, as follows:

> "Nothing rec-d to date from Inter Insurance Exchange Seattle will forward soon as get it Will advise you." (Tr. 234).

We will now go back to the course pursued by the parties in marketing the lumber. Ben W. Henderson testified:

> "Then we were to stencil the lumber in their name and to load it and ship it according to their instructions. When we got orders we were to plane whatever we got orders to plane. We were to plane it, load it on the car and ship it according to their orders." (Tr. 143).

Referring to the invoices from Donlan & Henderson to Turner, Dennis & Lowry Lumber Company which were made by appellants as the various cars were shipped, Henderson said:

"They were to have the 15% for selling; each one of them was marked "less 15% commission." As a matter of fact, that is what Turner, Dennis & Lowry got out of the deal, 15% commission, whatever they would sell the lumber for."

"As to whether I knew what they would be able to get for this car load of lumber, the first car load of lumber, if I remember right, we had the price on that. Now, they were unable to get us very many cars, it seems, but after they finally began to give us orders—I think the first two cars of regular shipments were also put on that kind, and generally they would put up a load of orders that were transit orders, that were not desirable, but we loaded first on transit orders, which were handled in this way: They would telegraph us to ship a car load to Alliance, Nebraska; we would ship it; then they would divert it to a customer they found while the car load was en route, collect the amount, retain the $20 per thousand they had advanced us, retain their 15% commission, and we would get the balance. They were all handled the same way. All the lumber that was shipped by us, they were supposed to find the purchaser, take out the $20 a thousand and the 15%, and deliver to us the balance, less the freight." (Tr. 143-144).

Under date of May 17, 1920, the appellee wrote Donlan & Henderson as follows:

"We have your favor of May 8th, enclosing the memorandum of stock on hand in the shed and planing mill. We are glad to have this, and will make up orders in the next few days to cover this stock, so you may get this out of the way.

"We have been waiting a few days before sending you orders for the No. 4 boards, thinking that the market would indicate more clearly just what could be expected in the next several weeks, but so far there is no disposition for conditions to settle down to a more stable basis. The market is quite badly upset with quite a wide range of prices being quoted.

"We will send orders to you during the next few days for several cars of No. 4 boards, and we believe it would be just as well to get some of this low grade stock in consumption now, rather than hold it against possible advances of the market which might not materialize." (Tr. 217-218).

A letter from appellee to Donlan & Henderson dated June 9 contains the following:

"Please let us know just as soon as you want orders, as we want to keep the Planing Mill fully occupied when you finally get to the place of taking on business.

"The market is in such a deplorable condition at this time that we are not disposed to hasten the issue in any way, as we look for a stronger price situation a little later on than now prevails, but of course when you get ready to start shipping, you want to continue operating, and we want to be sure that you have orders on hand to take care of your full running time." (Tr. 218-219).

The following letter by appellee under date of June 17 accompanied the first order:

"We are enclosing our order 616-D car of No. 4 Western White Pine S2S at $51.00 Elwood City, Pa. This is sold at a good high price. It isn't very often that we can get an order at such a high price as this but we are giving you full benefit as per our agreement on the sale of this stock. What we want now, is a large car and prompt shipment, therefore please get this order out at once and oblige." (Tr. 220).

The invoice for this order is abstracted on pages 144 and 145 of the transcript as follows:

"Also an invoice from Donlan and Henderson to Turner, Dennis & Lowry Lbr. Co. dated July 1, 1920,

for 28,884 feet, $1471.04, less 15% commission $220.65, net $1250.39. marked Sold to Monongahela Lbr. Co., Elwood City, Pa.' "

Under date of June 16 appellants wrote appellee a letter containing the following:

"I am in reciept of your letter of the 9th inst. * * * You, no doubt before now have received our request for orders, on receipt of which we will start the planer immediately. We have lost no time sawing." (Tr. 221).

Under date of June 18 appellants wrote appellee as follows:

"We are in receipt of yours of the 14th inst., and note what you say of the present market condition, and of a likely improvement within the next thirty days.

"There is nothing that we particularly desire to move at this time, and in the matter of orders; we are leaving that entirely in your hands. While we are anxious to get things moving towards steady shipments, we do not care to ship anything that would not justify us, and do not want to make any sacrifices just to ship at this time.

"You are in constant touch with the eastern market, and based on that, and if you think that there is anything particularly that we would be justified in shipping send us the orders."

Under date of June 25 appellee wrote appellants as follows:

"We have your letter of June 16th and 18th.

"We are certainly glad to know you feel disposed to leave the matter of sales in our hands, as we assure you that we have your interest as much or more at heart than our own. We could sell some stock at present by

forcing the issue, but the market is almost dead; and practically the only stock that is being sold is an occasional order which fits some customer's immediate requirements.

"There is a little speculative buying being done, but only at ruinous prices, and prices which we do not feel disposed to meet unless under pressure.

"We are quite anxious to realize on some of the funds which we have tied up in our various contracts, but we feel that we are serving our Mill connections best by not pushing their stock too hard on the present market." (Tr. 222).

In a letter dated July 24 appellants referred to a previous letter in which they had notified appellee their mill would shut down to install a blower and explained that they had been delayed in getting some blower parts and had been shut down longer than they had expected but that they then planned to start planing again in a few days (Tr. 169).

Ten cars were shipped before the fire and one car that escaped the fire was shipped afterward, making a total of eleven cars that were shipped (Tr. 223). The invoices from Donlan & Henderson to Turner, Dennis & Lowry for these cars are abstracted on pages 144, 145 and 146 of the transcript. They all show that the lumber was sold by Turner, Dennis & Lowry Lumber Company for a commission of 15% and some of them contain the notation made by plaintiffs: "Sold on consignment basis less 15% commission."

We have tried by this statement to place before the court in convenient form those facts which we think present the issues to be determined in this appeal. The failure of the appellants to sustain by proof the grades and quantities of each grade of which they say the lumber destroyed by fire of August 3, 1920, consisted, their failure to prove by any evidence that the value of the lumber at that

time destroyed exceeded the insurance carried by them, the accounting by which the debt from appellants to appellee was arrived at, and the conduct of the parties under the contract in regard to the lumber cut after the fire, are matters which we will consider in another place.

The decision of the trial court and the judgment will be found on pages 112 to 126, inclusive, of the transcript of record. The decision of the court will also be found at page 71 of volume 275 of The Federal Reporter, where the case is reported.

## BRIEF OF THE ARGUMENT.

### I.

On page 118 of the transcript the trial court said:

"The consequences are clear. As owner of the lumber burned, defendant loses its investment therein and its prospective profits, but indemnified to the extent of the stipulated insurance of $25.00 per M feet, and as owner of the lumber not burned, it is obligated to resell in accordance with the contract. In respect to neither is it entitled to recover from plaintiffs any of the $20.00 per M by it paid. Nor are plaintiffs entitled to recover what they might have received had the lumber been resold before burned. They sold it to defendant for $20.00 per M and its promise to resell, whereupon if for a price in excess of the amount due defendant by virtue of the contract, viz., $20.00 per M plus 17% of the resale price, defendant would pay the plaintiffs the equivalent of such excess. Before resale, no money was due plaintiffs, no debt to them existed. If resale was for an excess price as aforesaid, money would then be due plaintiffs, a debt to them would then be created. The happening of resale alone would determine what, if anything, was due plaintiffs, the amount, and the time of payment. Defendant's promise to pay was not absolute, but was conditional and plaintiffs' right to payment was not vested but was contingent.

"By reason of destruction of the lumber the condition failed, the contingency did not happen, and both the promise and the right expired.

"For in these circumstances the law is that the failure of the event to happen without fault of the promisor, prevents creation of a money debt, terminates the promisee's expectancy of payment, and excuses failure to perform the promise."

This statement by the court appears to contain the substance of all that to which appellant's assignment of error and argument are directed.

The ruling and result in this case are supported by an overwhelming weight of authority, even assuming, as the trial court assumed, that the absolute property in the lumber had vested in appellee and that the transaction resulted in a sale for resale and not an agency or factor's arrangement by which, as appellee contended at the trial, the title passed to appellee as security with an interest in the lumber similar to the ordinary factor's lien to secure advances.

Appellants have confused this case with those in which the purchase price is immediately payable but is to be determined by weighing, measuring, testing, counting, inspecting, etc., and the act which will determine the amounts immediately payable has become impossible by the perishing of the goods to be sold. In those cases some courts have held that the purchase is complete and the debt may be created although the measurement has not been performed, and the measurement may be estimated from the best evidence then procurable. Without exception the cases cited by appellants involve situations quite different from those here presented and are quite wide of the mark.

*Hatch* v. *Standard Oil Company,* 100 U. S., 124, does not involve a question of lost or destroyed goods and merely presents a controversy as to whether, as against an attaching creditor, the title to certain staves had passed to the purchaser.

In *Noyes* v. *Marlott,* 156 Fed., 753, the sellers agreed to fell, cut, raft, drive, and deliver a certain quantity of

logs in the channel or slough of the Chena River. The purchaser agreed to provide in the slough departing from the Chena River the necessary boom for the arresting and detention of the logs and to remove them to the banks and at the time of such removal to scale them and pay for them. A drive of logs was put into the boom by the sellers and on the next day the river began to rise and the boom which had been provided by the buyer gave way and the logs remaining in the slough were swept down the river and lost. This court held that the buyer must pay for the logs. The features which distinguished that case from this are clearly recited in the opinion where you said:

> "But everything the loggers, as sellers, had to do with the logs, was completed when they delivered into the slough. After delivery, their only interest was in recovering the price agreed upon when the measurement was ascertained by Noyes, the purchaser.
>
> "A circumstance in the case to show that there was no condition in the sale is the fact that, after the logs in the first drive had been delivered into the slough, Noyes employed the loggers, defendants in error, to help him pull the logs onto the bank, and paid them daily wages for such service."

In *Oil Company* v. *Van Etten,* 107 U. S., 325, the seller agreed to deliver barrel headings to be piled on the land of the buyer who was to furnish a man to count them, as they were from time to time piled, in order to obtain an approximate estimate of the quantity piled, and thus to determine the amount of advances to the seller under his contract, but the inspection and final count was to be made by an inspector appointed by the buyer at a point to which the latter shipped them. The property in the headings was to pass to the buyer on delivery of them on his land. There

was a difference between the quantity shown by the two counts and the court held that any evidence was admissible which tended to show the correctness or incorrectness of either count.

An examination of all of the cases cited will reveal a similar difference in facts and inapplicability as authority in this decision.

The trial judge ably sustains his decision in this case and we doubt if a more clear exposition of the principles applicable can be found. But we desire to call your attention to some features of the contract and to some additional authorities which demonstrate the correctness of his conclusion.

We will look at the obligations assumed by the parties under the terms of the written agreement. The appellants on their part were to do the following things:

(1) To manufacture and grade the lumber.

(2) To deliver the lumber F. O. B. cars at Fletcher Spur either dressed or rough as directed.

(3) To ship the lumber and render an invoice and bill of lading with draft, and,

(4) To insure the lumber for the benefit of the appellee.

The appellee's promises were:

(a) To advance $20.00 per thousand feet as the lumber was piled, sawed and stenciled.

(b) To market and sell the lumber for the highest market price obtainable and pay to appellants such market price, less 15%.

While we have not named all of the obligations of the appellants, the two obligations of the appellee above named are the only ones which it assumed, the first, namely, to advance $20.00 per thousand feet was carried out by the appellee. The second obligation, which the court will note was not to pay any money, but was to "market and sell said lumber", etc., was not performed so far as the lumber destroyed by fire was concerned because it became impossible thereafter for appellee to sell the same or any part thereof. The obligations of appellants above described were conditions of the contract and only the first one had been performed by the appellants. As the trial court so clearly expressed it (Tr. 118-119):

> "For in these circumstances the law is that the failure of the event to happen without fault of the promisor, prevents creation of a money debt, terminates the promisee's expectancy of payment, and excuses failure to perform the promise."

The same rule is stated in The Tornado, 108 U. S., 342, at page 351, where the court said:

> "On principle, this case falls within the rule that where the stiplations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed. The ship-owner was entitled to freight only for carrying the cargo and delivering it at Liverpool, with the implied covenant that this particular vessel was to take it on board and enter on the voyage. Before that event occurred this vessel was substantially put out of existence by no fault of the shipper, and he had and could have no benefit from the contract. He had a right, therefore, to treat the contract as rescinded, so far as any liability for freight was concerned. In *Taylor* v. *Caldwell,* 3 Best & Smith, 826, it is laid down

as a rule, that, 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.' The reason given for the rule is, that without 'any express stipulation that the destruction of the person or thing shall excuse the performance,' 'that excuse is by law implied, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.' The rule was there applied to excuse the owner of a music hall, which had been burned, from fulfilling a contract to let the use of it. The principle was extended further in *Appleby* v. *Myers,* L. R. 2 C. P., 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not. See Benjamin on Sales, 3d Am. Ed., Sec. 570; *Wells* v. *Calnan,* 107 Mass., 514, and cases there cited. These principles are so well established that it is only necessary to refer to one case in this court, *Jones* v. *United States,* 96 U. S., 24, which recognizes them, in which it is said:'' Quoting.

Appellants rest their case on the theory that the loss follows the title and would have the court hold that there are no exceptions to that rule, whereas there are many cases in which exceptions have been applied. The reason is that the law of sales is a branch of the law of contracts.

A contract of sale is still a contract and is governed by the rules of contracts. One of the essential principles of the law of contracts is that parties may make what bargain they please. This is the statement of Judge Blackburn, an authority on the law of sales. 25 Halsbury, Laws of England, 204 note. Most of the rules of the law of sales are rules for ascertaining the intention of the parties. When the parties have made a particular bargain it must be enforced regardless of what the general rule may be. That the general rule emphasized by appellants is always subject to exceptions dependent upon the particular contract has been noted many times. Thus the Supreme Court, in Elgee Cotton Cases, 22 Wall. 180, at page 194, states the general rule and recognizes the exception:

> "It must be admitted that when a contract of sale has transmitted the property in its subject to the buyer, the law determines, in the absence of agreement to the contrary, that the risk of loss belongs to him. This is a consequence of his ownership, though undoubtedly the property may be in one and the risk in another."

And as a contract of sale is a contract, an action for the price of goods is an action upon a promise. Ordinarily a promise to pay the price becomes absolute upon the passing of title, but if the promise to pay is conditioned upon a contingency and that contingency does not happen, the promise to pay will not ripen into a debt. The trial court applied this rule to the facts of this case in the following language: (Tr. 120, 121)

> "It will be conceded plaintiffs' right to any payment and how much, depended upon resale for a price in excess of the amount due defendant as aforesaid, and it will be conceded that if values depreciated by reason of time, weather, borers, insects and the like, plaintiffs

would lose accordingly. That is, if because thereof the lumber resold for no more than due defendant as aforesaid, though worth more at time of sale, plaintiffs would be entitled to no payment from defendant.

And the same principle that in whole or in part would discharge defendant's promise in these circumstances of partial destruction of the lumber or of its value, in whole discharges it in the instant circumstances of fire and total destruction of the lumber. Both parties understood this and both insured. The 2000 M feet first sold to defendant, contemporaneously cost plaintiffs $35.00 per M feet. They received $20.00 per M from defendant, agreed to insure in defendant's interest for $25.00 per M and did insure for $35.00 per M the amount they had paid for the 2000 M. Later, they secured $60,000.00 more insurance, aggregating on all (94) the lumber, $55,000.00 more than the $25.00 per M they agreed to carry for defendant on the lumber burned, and all of which they collected. That some of it was on lumber not sold to defendant, does not detract from the implication in respect to their understanding aforesaid.

It is urged by plaintiffs that as defendant paid them but $20.00 per M for the lumber burned, and thereon claim the stipulated insurance of $25 00 per M, $5.00 thereof is profit which on some equitable principle it ought to share with plaintiffs even though secured by a resale of the lumber. This cannot be maintained. In any view of the parties' respective interests in the burned lumber, even as other co-owners each could insure their or its interest, without liability to share proceeds with the other."

Appellants do not sue for the balance of a purchase price agreed to be paid by appellee for the lumber which was destroyed by fire because there was no agreement that appellee should pay any purchase price. The agreement was that when appellee should procure purchasers for the lumber appellants should deliver it, dressed if required,

f. o. b. cars at Fletcher Spur, and that appellee should then pay to appellants the price for which it had sold the lumber to the customers, less 15%, less 2% trade discount, and less $20.00 per thousand feet already paid and advanced on said lumber. As we understand appellants' counsel they do not contend that appellants were creditors of appellee at the time of the fire; it was clearly the intention that such relation would not exist until the lumber should actually be sold by appellee to a customer. We understand their position to be that the title to the lumber had passed to appellee, that the loss follows the title and that by reason of the destruction appellee became liable to appellants by operation of law and that the destruction created a debt where there was none before.

This theory is conclusively refuted by the opinion of the court in this case, and, while we do not concede that the absolute title to the lumber passed the result must be the same whether the title was at the time of the fire in appellants or appellee.

The title may be in one and the risk of loss may be in another. The risk of loss may be, and was here, the subject of agreement. The intent must govern and it was not intended by the parties that appellant should pay appellants for any lumber that should be destroyed by fire. Any rules that might be applied in cases where the intention was otherwise or where there was nothing to indicate the intention are not applicable to the facts of this case.

In the Elgee Cotton Case, 22 Wallace, 180, l. c. 194, the court said:

> "It must be admitted that when a contract of sale has transmitted the property in its subject to the buyer, the law determines, in the absence of agreement to the contrary, that the risk of loss belongs to him. This

is a consequence of his ownership, though undoubtedly the property may be in one and the risk in another."

We very earnestly and confidently assert that in this case there was an "agreement to the contrary" very clearly established by the writing, the conduct of the parties under it, and the construction they placed on it. Loss by fire was one of the things contemplated by the parties when they made the agreement and it was clearly their intention that in such event the appellee should be paid, out of insurance to be paid for by appellants $25.00 per thousand feet to cover its loss and that appellants should either insure against or bear any loss which they might suffer. This is apparent from clause 8 of the writing, which is as follows:

> "8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for $25.00 per thousand feet, the loss thereon to be made payable to the vendees."

Mr. Dennis testified, that at the time of his agreement with Mr. Donlan he explained to him that, in addition to the money advanced by appellee and the interest that should accrue thereon, appellee would incur expenses in preparing to market the lumber and that its entire loss should be covered by insurance paid for by the appellants (Tr. 202). The sum of $25.00 per thousand feet was fixed as a liquidation of appellees loss and it was clearly intended that all other loss should be borne by appellants The conduct of the parties from the beginning to the end of their relations forces this understanding as an irresistible conclusion. Mr. Henderson testified that before the fire an insurance agent suggested that they take more insurance

and that he, Henderson, replied that they would rather take some chance of loss than to pay all of their money for insurance premiums. (Tr. 362) The entire conversation as related by Mr. Henderson clearly showed that he then understood that in event of fire the loss above the advancements made by appellee would fall upon the appellants. In a letter from one of the appellants to appellee after the fire they said "we were underinsured." (Tr. 156) When asked by his counsel whom he meant by we, he replied Donlan and Henderson. (Tr. 157) Mr. Donlan testified that he asserted to Mr. Dennis or Mr. Lowry, or to both of them, that he would never pay to defendant out of the insurance more than the amounts advanced by appellee with interest, but that he would pay appellee the amount of the advancements. (Tr. 374) He contended that appellee's loss was $20.00 per thousand feet and that appellee's loss was all appellants were bound to pay. He understood then that under the agreement appellee's loss was to be covered by insurance and that all of the remainder of the loss, if any, must be borne by appellants. He understood that the balance of the insurance was all he would get from any source and he was trying to keep as much of that fund as he could find excuse to keep. (Tr. 228) If he had not understood that the risk of loss was upon appellants he could have had no object in claiming $5.00 of the $25.00 per thousand feet he had agreed to carry for appellee; he would have claimed the right to take appellants' entire loss out of the insurance and pay appellee the balance. The appellants actually paid the appellee $60,000.00 of the insurance and promised to pay what they owed appellee out of the remainder. (Tr. 228) During all the conversations and correspondence that followed the fire appellants never once

asserted that the fire loss should fall upon appellee, but, on the contrary, all that they did, all that they wrote and all that they said indicated that it was their understanding that the uninsured loss should fall upon the appellants. We say again that it is absolutely immaterial whether the title was in the appellants or in the appellee and that the rule of law, applied in some cases, that the loss follows the title, has no application here. The intention of the parties is manifest and the intention must govern. The only conclusion that can be drawn from clause 8 of the writing is that appellants should bear or insure against all loss by fire in excess of $25.00 per thousand feet, but if the intention of the parties as shown by that clause is questioned the construction placed upon it by the parties will determine their intention.

In *Old Colony Trust Company* v. *Omaha,* 230 U. S., 100, l. c. 118, the court said:

> "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."

In *Insurance Company* v. *Dutcher,* 95 U. S., 269, l. c. 273, the court said:

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former.

> In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

In *District of Columbia* v. *Gallaher,* 124 U. S., 505, l. c. 510, the court said:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

This understanding seems to us to quite naturally follow the arrangement that appellee should sell the lumber and account to appellants for the proceeds after taking out its advancements and commissions and other specified expenses. The status which now exists is exactly what the parties must have expected in event of fire. The legal effect of it is simple and the parties doubtless understood that as well.

The destruction by fire could not in itself cast an obligation on appellee to pay for the lumber and no such obligation existed independently of the fire. The conditions upon which appellee should become bound to pay appellants any money had not arisen at the time of the fire and it was not contemplated by the parties that they would arise at all in event of destruction of the lumber. No money has become payable from the appellee to the appellants under the terms of the writing relied on. Appellee has derived no benefit from the destroyed lumber and no obligation to pay for it arises out of natural justice. It was not contemplated that appellee would pay for the lumber as a purchaser. Any payments by appellee to appellants were

to be made out of sales after deducting railroad charges, appellee's advancements, appellee's commissions and other specified expenses. Appellee was not in default at the time of the fire.

*Frank et al.* v. *Butte & Boulder Mining Co.,* 48 Mont., 83, a decision of the supreme court of the state in which the transaction took place, is in point. The contract there under consideration contained this clause:

> "It is further understood and agreed that the said thirty thousand dollars so advanced and to be advanced by the said H. L. Frank, shall be repaid to the said H. L. Frank by the said company, out of the first earnings of its business, after deducting running expenses, which said earnings are to be computed and paid over at the monthly meetings of the board of directors of said company."

On pages 87 and 88, the court said:

> "The contention of respondents is that the contingency mentioned in the contract that repayment should be made out of the net earnings of the company merely postpones the time of payment, and that upon the completion of a reasonable time the obligation becomes absolute and can be enforced, whether there were any net earnings of the company or not."

After considering the cases cited in support of this contention, the court said:

> "Appellant relies upon cases which hold that a contingency, such as the one above used, affects the liability, renders the obligation conditional, and imposes upon the party seeking its enforcement the burden of showing that the contingency has happened or the condition has been fulfilled before recovery can be had."

The court then cites cases and considers the question and on page 90 says:

> "The parties explicitly agreed that Mr. Frank should be paid from a special fund as rapidly as it should be accumulated. The meaning of the parties is not left in doubt. If it was their intention to create a general liability on the part of the mining company which would subject all of its property to seizure and satisfaction of Frank's claim, why, then, should they say, in the portion quoted above, that Frank's indebtedness was to be paid out of the first net earnings of the company's business?"

The only material difference between that case and this is in our favor. There the obligation to pay in event the fund out of which payment was to be made should arise already existed, while here there could be no obligation upon appellee to pay appellants any money until appellee should sell the lumber in the market and place the customer's order with appellants and appellants should dress the lumber, if required, and load it on the cars and a surplus of the selling price should then remain after deducting appellee's advancements and commissions and the specified expenses. It is unnecessary to consider what would have been the effect if appellee had breached its duty as a selling agent; this action is not brought on that theory and the facts would not sustain it if it had been so brought.

The decision of the trial court is in line with the well established principle of the law of sales. In 25 Halsbury, Laws of England, at page 189, we find the following:

> "When the contract expressly or by implication, provides that the price of the goods, or some part of it, shall be payable only if the goods arrive at their destination, or are actually delivered to the buyer, or on similar

terms, the risk during the transit attaches to the seller to the extent of so much of the price as is so contingently payable, although the property in the goods may have passed to the buyer."

*Calcutta & Burmah Steamship & Navigation Company* v. *De Mattos,* 32 L. J. Q. B. N. S., 322, and 33 L. J. Q. B. N. S., 214, is so similar in its facts, so well considered, and so ably elucidated that it should be controlling in this case. The principle is there made plain that each contract must be interpreted according to its own terms and that the mere fact that the title may pass to a buyer does not itself fix the buyer's liability to pay for the goods. In that case Blackburn, J., in the lower court, rendered the opinion which was finally adopted in the upper court as the basis for decision in the whole matter. His statement of the case is as follows:

"Leaving out those parts of the contract not relevant to the present dispute and stating the terms as they were finally agreed to in the very words of the letters, the contract is thus expressed: 'De Mattos is to supply the company with 1,000 tons of any of the first-class steam coals on the Admiralty list, obtainable at the port of shipment, the selection of the particular description to be at the company's option, delivered at Rangoon alongside craft, steamer, floating depot or pier as may be directed by the company's agent at that port, shipment to be before the 30th of June then next. The price to be *45s.* per ton of 20 cwt., delivered at Rangoon; payment one-half of invoice value by bill at three months, on handing bills of lading and policies of insurance to cover the amount, or in cash under discount at the rate of 5£ per cent. at De Mattos' option, and the balance by the company's Rangoon agent's drafts on the company in London on completion of delivery at Rangoon.'"

The shipment was made, the policies of insurance and the bill of lading were delivered to the purchaser and half the purchase price was paid. The ship started on its way, encountered stormy weather, part of the cargo was thrown overboard and the balance of the cargo was necessarily re-shipped in another vessel. On arrival at Rangoon, the master of the latter vessel offered the coal to the purchaser on payment of the freight charges on the new vessel, which offer was refused, and the coal was later purchased by the company, the original purchaser, when the master of the second vessel put up the coals for sale at auction. There were two actions stated by consent without pleadings; one was brought by the company, the purchaser, to recover back from De Mattos, the seller, the amount paid as an advance on the coal and to recover damages for non-delivery as agreed. The other action was brought by De Mattos against the company to recover the balance of the contract price of the coal, or in the alternative to recover the value of the remainder of the coal which finally reached Rangoon.

The holding of the court was that neither party could recover from the other. In the course of numerous opinions, no judge held or indicated that De Mattos could recover from the company anything on account of the coal thrown overboard or the coal not delivered at Rangoon as agreed in the contract.

We believe that assuming the contract here in question to be a contract of sale and that the title here passed absolutely, and not as security only, the provisions of the two contracts are identical in effect.

The SUBJECT-MATTER of the De Mattos case was:

1,000 tons of any of the first-class steam coals on

the Admiralty list, obtainable at the port of shipment, the selection of the particular description to be at the company's option.

The subject-matter in this case was:

All of the lumber now owned by the vendors in pile at their saw mill yard at Fletcher's Spur and all lumber to be sawed, cut and manufactured by them at said Spur until the 1st day of January, 1921.

The DELIVERY PROVISION in the De Mattos case was as follows:

De Mattos is to supply delivery at Rangoon alongside craft, steamer. floating depot or pier as may be directed by the company's agent at that port; shipment to be before the 30th of June then next.

The delivery provision in this case was:

"3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees."

PASSING OF TITLE. The De Mattos agreement contained this provision:

"Payment one-half of invoice value by bill at three months, on handing bills of lading and policies of insurance to cover the amount, or in cash under discount at the rate of 5£ per cent., at De Mattos' option." Blackburn, J., held that the title passed to the company by virtue of the delivery of the bill of lading, and Cockburn, C. J.. in Queens' Bench, and Earle, C. J., Willes, J., Channell, J., and Williams, J., in Exchequer Chamber also held that the property in the coals passed to the company on the shipment and delivery of the shipping documents.

The provision in the contract now before the court is as follows:

> "5. That upon the payment of the advance of $20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

The PROVISION FOR PAYMENTS in the De Mattos case was:

> Payment one-half of invoice value by bill at three months, on handing bill of lading and policies of insurance to cover the amount, or in cash under discount at the rate of 5£ per cent. at De Mattos' option, and the balance by the company's Rangoon agent's drafts on the company in London on completion of delivery at Rangoon.

The payment provision in this case was.

> "1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of $20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, * * *; and that the vendees shall also pay and advance to the vendors the sum of $20.00 per thousand feet on all lumber to be hereafter sawed."
>
> "4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber

under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less $20.00 per thousand feet already paid and advanced on said lumber has hereinbefore provided, which draft the vendees agree to honor and pay when presented."

The INSURANCE PROVISION in the De Mattos case was:

> Payment one-half of invoice value by bill * * * on handing bills of lading and policies of insurance to cover the amount.

The provision in this case was:

> "8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for $25.00 per thousand feet, the loss thereon to be made payable to the vendees."

The most satisfactory opinion in the De Mattos case is that of Blackburn, J.,, in the lower court, which was repeatedly referred to and approved by the judges in the upper court, and whose conclusion and decision was finally adopted. After stating the rule of law that various circumstances had been treated by the courts as sufficiently indicating the intention that the price will not immediately become payable, on pages 329 of 32 L. J. Q. B. N. S., he said:

> "I think this a very accurate statement of the law: and I think, therefore, that in construing this contract the *prima facie* construction is that the parties intended that the property in the coals vested in the company and the right to the price in De Mattos as soon

as it came to relate to specific ascertained goods; that is, on the handing over the documents; and the inquiry must be whether there is any sufficient indication in the contract of a contrary intention. As to one-half of the price, the balance, as it is called in the letters forming the contract, the intention that it should only be paid 'on completion of delivery at Rangoon' seems to me as clearly declared as words could possibly declare it; and consequently, I think, as to that half of the price no right vested in De Mattos unless and until there was a complete delivery at Rangoon. But, consistently with this, there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos; so as in effect to make the goods be at the risk of the company, though half the price was at the risk of De Mattos; so that the goods were sold and delivered, though the payment of half the price was contingent on the delivery. And this, I think, is the true legal construction of the contract."

And on pages 328 and 329 of the same volume, after speaking of two common cases in which the goods may be, first, at the risk of the buyer, and second, at the risk of the seller, he concludes:

"But the parties may intend an intermediate state of things. They may intend that the vendors shall deliver the goods to the carrier and that when he has done so he shall have fulfilled his undertaking so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that they shall then be both sold and delivered and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving; just as they might, if they pleased, contract that the price should not be pay-

able unless a particular tree fall; but without any contract on the vendors' part in the one case to procure the goods to arrive, or in the other to cause the tree to fall."

Just as in the De Mattos case the company was not liable for and did not promise to pay the balance of the purchase price except "on completion of delivery at Rangoon," the appellee in this case was not liable for and did not promise to make any further payment except upon delivery f. o. b. cars at Fletcher Spur, either dressed or rough, as directed and ordered; indeed, still another contingency must have happened in this case before appellee would be bound to pay anything more: The lumber must have been shipped and sold for more than the advancement previously made by appellee and the expenses of marketing. This was a contingency that might never happen, and no debt could arise from appellee to appellants until it should happen. On page 120 of the transcript the trial court says:

> "It will be conceded plaintiffs' right to any payment and how much, depended upon resale for a price in excess of the amount due defendant as aforesaid, and it will be conceded that if values depreciated by reason of time, weather, borers, insects and the like, plaintiffs would lose accordingly. That is, if because thereof the lumber resold for no more than due defendant as aforesaid, though worth more at time of sale, plaintiffs would be entitled to no payment from defendant.
>
> And the same principle that in whole or in part would discharge defendant's promise in these circumstances of partial destruction of the lumber or of its value, in whole discharges it in the instant circumstances of fire and total destruction of the lumber."

## II.

On pages 9 to 14 of their brief counsel urge upon the court the principle that "when a person by his own contract unconditionally undertakes a duty, he is bound to perform it or take the consequences, notwithstanding any accident by inevitable necessity," and cite cases to this general effect.

When handling the sword of impossibility counsel appear to have forgotten that it has two edges. Turning to the contract in question we find that it imposes conditions on appellants which they had not performed. The contract requires that "the vendors shall deliver said lumber f. o. b. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees." This had not been done, and until it was done appellee was not required to pay appellants anything more than the $20.00 per thousand feet which had already been advanced. Another condition imposed upon appellants and which they did not perform was that "the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less $20.00 per thousand feet already paid and advanced on said lumber." The obligation that would have been cast upon appellee if all these things had been done was to pay to appellants "the highest market price for which it is sold by them, less 15%" (Tr. 17). The parties on both sides had something yet to do before appellee could become obligated to appellants to pay them any money. All that is said by counsel in their brief concerning impossibility applies as well to the parties on one side as it

does to those on the other and leaves them in this respect exactly where the trial court left them. The following from The Tornado, 108 U. S. 342, l. c. 351, is applicable to this situation:

> "On principle, this case falls within the rule that where the stipulations of a contract are interdependent, a defendant cannot be sued for the non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed."

Furthermore, appellants were in default in a condition to be by them performed, and which could have been performed by them before the fire. They did not comply in any particular with the insurance provisions of the contract. According to Henderson's statement he insured the two million feet of lumber purchased from Smead for $70,000.00. which was the amount appellants paid for it, and made the sum of $20.00 per thousand feet payable to appellee as its interest might appear (Tr. 142). The appellee was not even mentioned in the policies covering the new cut. Appellants say this was an oversight and an inadvertence and that they recognized the obligation to provide the insurance and their liability to account for what they had received (Tr. 142). This, however, does not help appellants in this action. One who fails to perform the conditions of a certain contract on his part and for that reason is debarred from bringing an action upon it, cannot save himself by saying, "My breach was an inadvertent one. I recognize my accountability therefor and by reason of my repentence and recognition of my obligation, I desire to recover from the defendant."

*Waite* v. *Shoemaker,* 50 Mont. 264, l. c. 277;
*Riddell* v. *Peck Williamson Co.,* 27 Mont. 44.

A debt will not arise under a contract until all of the conditions precedent have been fulfilled. If the contract had been that appellants agreed to sell and appellee agreed to buy certain lumber, then, of course, the title would have passed and the obligation to pay the purchase price would have arisen. But that is not the case here. Even assuming the contract to be as appellants allege, appellee did not promise to pay anything at the time title should pass or because title passed, the promise is absolutely a conditional one and the conditions precedent have not been performed by appellants. They cannot recover merely because the title passed to the appellee, because under the facts of this case the passing of title and the obligation to pay for the lumber were not co-incident by any means.

Appellee performed the requirements of the contract as far as it could. The trial court in its decision said: "Throughout the contract, market conditions were unfavorable, and both parties, in hope of improvement, acquiesced in few resales and shipments" (Tr. 115-116). The evidence and references to the transcript quite fully set out in our statement will clearly show appellee's anxiety to dispose of the lumber and get its money out of it as soon as practicable.

The interdependent obligations were upon the expectation that the lumber would continue in existence until it should be marketed and shipped. As we have seen, it was the intention that in event of fire the appellee should be insured to the extent of $25.00 per thousand feet and that appellants would insure against or stand any loss that might come to them by destruction of the lumber. This carries with it the intention that parties on both sides should

be relieved from performance of some of the conditions of the contract in event of destruction of the property.

*Dexter* v. *Norton,* 47 N. Y., 62, l. c. 64, is applicable here; the court there said:

> "But there are a variety of cases where the courts have implied a condition in the contract itself; the effect of which was to relieve the party when the performance had without his fault become impossible, and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract. For instance in the case of an absolute promise to marry, the death of either party discharges the contract because it is inferred or presumed that the contract was made upon the condition that both parties should live."

* * *

> "In *Taylor* v. *Caldwell,* 113 E. C. R. 824, A agreed with B to give him the use of a music hall on specified days for the purpose of holding concerts and before the time arrived the building was accidentally burned: Held that both the parties were discharged from the contract. Blackburn, J., at the close of his opinion lays down the rule as follows: 'The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of the performance, arising from the perishing of the person or thing, shall excuse the performance' and the reason given for the rule is 'because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing.' "

## III.

We believe there are reasons for affirming the judgment of the court in this case which are not stated or mentioned in the opinion which we believe are equally potent in arriving at the same result. The first ground which we will consider is that truly construed the contract was one of agency or a factor's agreement rather than a contract of sale. We believe that a fair construction is that the title to the lumber in question did not pass, except as security for an indebtedness owed to and advances made by appellee. This, we believe, is established by the instrument itself, taking all of its provisions together and considering them as a whole, and by the other evidence offered at the trial showing that the parties intended, understood and construed the contract and the bills of sale as passing title to appellee as security only and not otherwise.

So far as the use of the words "buy" and "sell", "vendor" and "vendee" are concerned, there is a great mass of cases holding that the use of such words does not determine the character of a contract, but that an instrument is to be held to be one of sale or of agency solely by examining what the respective parties agree to do. Thus in *D. M. Osborne & Company* v. *Joslyn,* 99 N. W., 890, the parties called their agreement one of sale but the court held that the relation of principal and agent was created. The same thing was true in the case of *Wilcox & Gibbs Co.* v. *Ewing,* 141 U. S., 627. In the following cases and authorities attention is called to the fact that many agreements or instruments contain features or elements, some of which resemble a sale and some an agency, and in all of them it is stated that the matter is not to be determined according

to what the parties call their arrangement, nor is the question to be decided merely because some term or provision indicative of a sale may be contained in the instrument, but that the instrument must be read as a whole so as to determine whether taking it by and large one sort of relationship or the other is really created.

*Lindsey Lumber Co.* v. *Mason,* 51 S. 750 (Ala.);
*Halleman* v. *Bradley Fertilizer Co.,* 32 S. E. 82 (Ga.);
*Fleet* v. *Hortz,* 66 N. E. 858 (Ill.);
*Sturm* v. *Boker,* 150 U. S., 312;
*Heryford* v. *Davis,* 102 U. S., 235; (called a loan, held a sale);
*Hervey* v. *Locomotive Co.,* 93 U. S., 664; (called a lease; held a conditional sale or mortgage);
Notes Ann. Cas. 1915 A. 601, 605; L. R. A. 1917 B. 626; 94 A. S. R. 241;
Meacham on Agency, Secs. 48 and 2499;
Meacham on Sales, Sec. 41;
See also *Halbert* v. *Kellen,* 142 N. W., 962; (good general discussion);
*Watkins* v. *Donnell,* 179 S. W., 980 (Mo.) (Used the word "purchase" held an agency);
*Ransom* v. *Wickerstrom,* 146 Pac., 1041; (gave bill of sale. As against third person allowed to prove this was in aid of agency.)

In the case of *Osborne & Company* v. *Joslyn,* 99 N. W., 890, referred to above, the contract provided:

"The party of the first part sells and the party of the second part buys the Osborne Columbia Corn Har-

vesters listed within at price annexed, same to be paid with express charges or exchange."

The court said:

"It seems to us that the only proper construction to be placed upon the contract, taking it by its four corners, is that it created the relation of principal and agent between plaintiffs and defendant; and though by its terms it purports to sell the machines to defendants, it should be construed in the light of the entire document, surroundings and the situation of the parties, and in harmony with the evident purpose and intent of the parties entering into it."

In *Heryford* v. *Davis,* 102 U. S., 235, at pages 243 to 244, one of the cases cited above, the court said:

"What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account."

A good general discussion of the subject is found in the case of *Halbert* v. *Keller,* 142 N. W., 962, at page 967. In that case the court points out that there is no universal test to be applied as to whether a particular instrument creates a sale or a consignment for a sale and that the only proper method to determine what relationship is created is to take the whole of the provisions of the contract without reliance upon any particular clause and without reliance upon the use of the words "buy" or "sell."

Another interesting case is that of *Home Bond Company* v. *McChesney,* 239 U. S., 568, 60 L. Ed. 444, in which the agreement recited that the second party "shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts." Here follows a table of discounts. "That the second party shall pay 78 per cent on 30 day accounts (etc.) upon delivery to and acceptance by second party of such accounts duly assigned to the party of the second part; and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party * * * The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid * * * Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party."

The Home Bonding Company, which is referred to as the second party in the agreement claimed title to those accounts in bankruptcy proceedings against the first party. The court held that these accounts receivable were not sold

but were merely transferred as collateral security for loans. The first paragraph of the syllabus recites:

> "Accounts receivable were not sold but were merely transferred as collateral security for loans by contracts under which the transferee was to make advances on acceptable accounts purporting to be sold to it, but which the transferror was to and did collect, bearing all the expense in connection with such collection. The so-called purchase price, to-wit: the difference between the face of the accounts and the discount not being known until payment of the account."

Coming then to the instrument in hand, we find, we believe, that most of the provisions therein contained show that there was an arrangement which more nearly resembled that of principal and factor than anything else. That the arrangement was substantially one whereby the appellee agreed to market and sell the lumber for the appellants, to make advances to the appellants in the nature of loans and to receive and accept bills of lading as security only is evidenced by the following provisions contained in the contract.

1. The advancements made shall bear interest at the rate of seven per cent per annum.

2. Advancements are to bear interest *"until paid."*

3. Such interest shall be computed and adjusted monthly based upon *"the balance thereof remaining against the vendors."* This, we think, shows beyond dispute that the parties regarded this as a debt from the plaintiffs to the defendant. If it were a payment on the purchase price, there certainly could not be any balance remaining against the plaintiffs.

4. The defendant "shall market and sell said lumber."

5. The instrument provides for a commission of fifteen per cent to defendant for its services.

These are all provisions characteristic of a factor's or commission merchant's agreement. The other provisions of the contract touching the use of the land and the right to use the planer are as useful and applicable in the case of a factor's agreement as in the case of a sale. The other provisions of the contract providing for the delivery of bills of sale and the transfer of title and possession might be indicative of a sale but they are just as useful to a factor or commission merchant who makes advances on goods, and we believe that the whole tenor of this instrument shows that such was the purpose here. Clause 5 does not provide that absolute title shall pass, but it says title shall pass *subject* to the balance payable to the vendor. The commission merchant or factor always receives possession of the goods and where advances are made provides either expressly or otherwise for a lien for the advances and nothing more than this, we believe, was done in this case.

The arrangement here was substantially the same as that found in *Lindsey Lumber Company* v. *Mason*, 51 So. 750, in which the court said:

> "From the contract it is necessarily inferable that the Canoe Mill Company operated a saw mill, the product being for sale; that this company was not financially full-handed nor favorably situated otherwise to promote the sale of the mill's product and to facilitate the collection of the proceeds of the sale thereof. On the other hand, the Lindsey Lumber Company was favored in these respects. In this state of circumstances the Lindsey Lumber Company engaged to furnish the Canoe Company orders 'at current market prices, suitable to cut all of their (Canoe Com-

pany's) logs into,' for a stipulated period that was by mutual agreement extended, 'and to arrange for such financial assistance as the Canoe Company may require from time to time to operate the mill, to make all collections for timber and lumber, to render such assistance as may be possible in getting cars to move said lumber.' In consideration of these services, the Canoe Company contracted to pay to the Lindsey Company $1 per thousand feet for all lumber cut and shipped, regardless of whether the orders were secured by the Lindsey Company or accepted by the Canoe Company without the service of the Lindsey Company. It was also provided that the latter class of orders should not be accepted so as to conflict with the filling of the orders of the former class.

When read in the light of the situation of the parties and of what was assumed as obligations on their respective parts, there can be no doubting, even, that the purpose and manifest common intent was to create a relation of principal and agent, and in no event to constitute the Lindsey Company a vendee of the cut of the mill. Aside from anything else, the employment of the word "orders," as therein contexted, put the matter beyond all cavil. Clearly the services in that regard contemplated the inducing of third persons to buy the product of the Canoe Company's mill. Other features, such as the stipulation for compensation for the services to be rendered by the Lindsey Company, obviously negative any intent whatever to sell the product to the Lindsey Company. The provision with respect to the current market price was inserted in the sole interest of the Canoe Company, and its evident office was to protect that company from orders, taken or received by the Lindsey Company, based on a price below the current market price. There is nothing in the instrument to warrant an insistence that a sale of the cut of the mill to the Lindsey Company was at all contemplated. The compensation to the agent is fixed by the contract at the sum of $1 per thousand feet of the cut of the mill."

It is well settled by a large number of authorities that documents purporting to transfer title to property may be shown to have been given as security and not otherwise. In the case of *Cabrera* v. *American Colonial Bank,* 214 U. S. 224, 53 L. Ed., 974, the court said:

> "The face of an instrument is not always conclusive of its purpose, in equity, extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved."

That case is particularly interesting because in that as well as in the present case, the ordinary situation was reversed. Ordinarily the person who gives a bill of sale afterwards attempts to prove that it was given as security. But the rule works both ways as shown by the case just cited in which the party giving the bill of sale asserted that it was given as an absolute conveyance and as full payment of the debt, whereas, the party receiving the bill of sale asserted that it was merely given and accepted as security.

In *Western Union, etc., Mortgage Company* v. *Valley Bank,* 237 Fed., 45, this court states the general rule as follows:

> "It has long been the settled rule that in courts exercising equitable jurisdiction it is admissible to prove by parol that instruments in writing apparently transferring the absolute title are in fact only given as security."

Supporting the same principle we cite:

*Colony Co.* v. *Omaha,* 230 U. S., 118;
*Topliff* v. *Topliff,* 122 U. S., 131;
*Knox* v. *Ninth National Bank,* 147 U. S., 100;
*Chicago* v. *Sheldon,* 9 Wall., 50;
*Hastings* v. *Fithian,* 71 New Jersey Law, 311, 60 Atlantic, 350.
*Brick* v. *Brick,* 98 U. S., 514, 5 Ruling Case Law, 388-389;
*District of Columbia* v. *Gallaher,* 124 U. S., 505.

In the last case, the court said:

"When in the performance of a written contract both parties put a practical construction upon it which is at variance with its literal meaning, that construction will prevail over the language of the contract."

The bulk of the testimony given at the trial had to do with the acts which the parties did in performance of their contract, and an examination of that evidence discloses that both parties throughout the time that the contract was being performed and until this suit was brought understood and interpreted the contract as we have interpreted it in this subdivision of our brief. We will review the evidence with this question in view:

1. Appellants took out insurance on all of the new cut of lumber in their own names (Tr. 142, 150). This they now say was an inadvertence (Tr. 142, 388). The policies taken in the names of appellants alone were issued at different times, and the same inadvertence, if there was any, must have happened three different times. The policies were returned to appellants a considerable time before the fire occurred and no change was made in them.

2. After the fire appellants made sole proofs of loss in their own name and claimed a sole, absolute and exclusive interest in the property (Tr. 316-317). It is inconceivable that these proofs of loss should have been presented in that manner honestly if the appellants then believed that they had sold the lumber to the appellee or that it was appellee's lumber. And why did appellants sign articles of subrogation covering lumber which was not theirs if they actually believed at that time they had sold the lumber to appellee? (Tr. 318, 322).

3. Late in September, 1920, appellants collected an insurance draft for $70,000.00 and paid $60,000.00 thereof to appellee (Tr. 228, 371). This was long after the fire had occurred. So far as the lumber destroyed by fire is concerned, the situation of the parties was just the same then as it is now. This fact not only shows that at that time Donlan & Henderson construed and interpreted the contract as we here interpret it, but it actually constitutes a presumption under the law of Montana. Section 10606 of the Revised Code of Montana makes it a presumption that money paid by one to another was due to the latter. It cannot be questioned, we believe, that at that time, when, as we have stated, the situation with regard to the lumber lost by fire was the same as it is now, appellants understood that they owed the appellee not only $60,000.00 but also more money than that. We believe that if there were no other evidence in the case touching the construction of the contract by the parties than the evidence of this $60,000.00 payment, it alone would be sufficient to determine the issues in this case in favor of the appellee. Donlan & Henderson cannot say that at the time when they paid us $60,000.00 they then believed that we had purchased this lumber and owed them $85,000.00 for it.

4. Henderson said in a letter: "We were underinsured," and on examination said that by we he meant Donlan & Henderson. He says that he told an insurance agent who solicited him for more insurance that he "expected to take a little chance along with the rest of them, and couldn't give it all to them fellows." (Tr. 362). This shows where Henderson understood the loss would fall in case of fire.

5. Donlan & Henderson, as well as some of the witnesses for the appellee, testified repeatedly (Tr. 361, 374, 376) that after the fire Donlan & Henderson, on each occasion when the matter was discussed, said that they did not understand, or had not understood, that defendant was entitled to the extra $5.00 per thousand feet of insurance money. Dennis testified that Henderson said that he could see how Dennis might put that construction upon the contract, but that if he had understood the contract that way he would have taken more insurance (Tr. 230). Henderson did not deny this conversation. This demonstrates that at that time Donlan & Henderson conceded that all other sums, outside of the $5.00 per thousand feet, claimed by appellee, were due to appellee. If at that time either Donlan or Henderson had supposed that they had sold the lumber destroyed by fire to appellee, they would not have limited their dispute to $5.00 per thousand feet. The fact is that at no time prior to the commencement of thisc ation was there any difference between the parties except this $5.00 per thousand feet and a few small items of interest on advances, demurrage and freight returns.

6. The evidence shows without contradiction that in November, 1920, appellants gave appellee a statement (Tr.

152) showing that appellants owed appellee a sum of money. The statement shows that no interest is computed on the advancements, but it surely demonstrates that as late as that date Donlan & Henderson did not think or believe that appellee was indebted to them on account of the lumber destroyed by fire.

7. When Donlan paid appellee $60,000.00 just before the first of October, he said that he was going to keep $10,000.00 of that for himself and that he would pay the balance when the later insurance returns came in (Tr. 228). The correspondence in evidence shows that towards the latter part of October appellee inquired of appellants whether the insurance money had been received (Tr. 231). Appellee sent a telegram on October 28 (Tr. 234) inquiring about a collection of insurance from the Inter-Insurance Exchange; Donlan replied by telegraph (Tr. 234); "Nothing recd to date from Inter Insurance Exchange will forward as soon as received."

8. The evidence absolutely fails to disclose any suggestion or request on the part of the appellants that appellee pay for the destroyed lumber. This is significant in many ways. It discloses most emphatically that up to the time of the institution of this action appellants did not consider that appellee owed them any money and also raises the question whether in any event any recovery can be had against the appellee without proof of a demand.

All of the evidence demonstrates that the parties themselves had the intention all of the time to deliver their bills of sale as security only, and that that was their construction of the contract throughout.

This view of the case leads to all of the results of the decision of the trial court and the judgment of that court that the defendant is the owner of 1,615,786 feet of lumber manufactured by plaintiffs since August 3, 1920, and upon which defendant has advanced and paid $20.00 per thousand and for which defendant has received bills of sale, and that such lumber is the property of defendant subject to the contract described in the pleadings herein, and that the defendant have and recover judgment against the plaintiffs and each of them for the sum of $18,221.17 (Tr. 126), should be affirmed.

## IV.

The judgment of the court below must be affirmed because there is a fatal variance between appellants' complaint and the proof.

We believe the variance is so obvious and clear that citation of authorities is not required to demonstrate that it exists. The complaint contains five counts. The fifth count was abandoned at the trial and no proof was offered in support of it. The fourth count alleges the refusal of appellee to make a certain payment or advance of $13,994.44 and this count is inconsistent with the main claim of appellants. There was no proof in support of the third count nor any contention made in its behalf, and the only counts of the complaint upon which appellants have relied are the first and second, which are substantially the same, the second being a more elaborate wording of the first.

The first count alleges a sale and delivery of the lumber of the value of $149,447.22; a promise to pay a reasonable price of said lumber within a reasonable time, that a rea-

sonable time has elapsed and that a balance is due the appellants, payment of which has been demanded but refused.

The proof discloses no such sale, contract or promise. The evidence shows that the parties entered into a written agreement of a rather elaborate character in which the appellee did not promise to pay a reasonable price for any lumber or to pay any price at all, but in which the appellee promised to do certain things and make certain sales and remit the proceeds thereof, which were to be determined and calculated in a particular and rather elaborate manner, with commissions deducted, and the like. We respectfully submit that the proof of such a contract as this does not in any way sustain or support the allegations of the complaint. The court was, therefore, under obligation independently of any other conclusions that may have been reached to find that appellants could not recover on their complaint and to dismiss it and to render judgment for the appellee for the amounts which the appellee showed were due it.

## V.

The trial court must necessarily have found against appellants because their proof wholly failed to suport a cause of action. In order to recover upon any theory advanced by appellants it would be necessary for them to prove the value of the lumber in question. It was admitted that approximately $130,000.00 of insurance money was collected by appellants and appellants conceded this must be largely credited to appellee. (Tr. 356). There is no evidence in the record to show that the lumber had any value over and above the amount of this credit.

Appellants offered in evidence what they referred to as bills of particulars. (Tr. 174, 185, 190). One of these

covered 2,000,000 feet of lumber and another some 1,338,412 feet. The 2,000,000 feet represented, or purported to represent, lumber cut and in piles at the time the contract was made, while the balance of the lumber was supposed to have been cut after the contract was made. There is absolutely no evidence that any of these lists correctly or properly showed what lumber was on hand. No one testified that they were made from a check of the lumber. There is not a word of testimony in the record that these bills of lumber represented the lumber which Donlan & Henderson owned at Pablo. Certain witnesses did testify as to the value of the items shown on these lists. But the origin of the lists and their correctness were never testified to by any one. At pages 140 and 141 of the transcript appear a question and answer which is absolutely the only thing in the record touching the value of the lumber in question. The explanation of the witness preceding the question shows that if Mr. Juneau ever mentioned any price of lumber it was done wholly without reference to any fixed or definite lumber and without reference to the stock of lumber which may have been on hand in the yard of Donlan & Henderson. Furthermore, the question was objected to by appellee, and the objection was proper unless further evidence to lay a foundation should be received, and that the foundation never was established and accordingly the answer, even if it were of any value otherwise, must have been discredited by the court.

The witness Juneau at page 296 tells exactly what he did, and all that he did in the premises was to hand Mr. Henderson the card of lumber prices prevailing at that time. (Tr. 360).

The result is that there is no evidence in the record to show that the lumber in question had any value what-

soever over and above the admitted credit to which appellee would be entitled. The court must therefore necessarily have been unable to find any judgment for the appellants on any theory and would be forced to the conclusion reached that the appellants' action must be dismissed and the appellee have judgment upon its counterclaims.

We respectfully submit that the appeal should be denied and the judgment of the trial court in favor of the appellee should be affirmed.

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